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POSTAL RATE COMMISSION
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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

Complaint on Sunday and Holiday Collections	Docket No. C2001–1

MOTION OF THE UNITED STATES POSTAL SERVICE FOR LEAVE TO REPLY TO THE DOUGLAS F. CARLSON ANSWER IN OPPOSITION TO THE POSTAL SERVICE'S MOTION FOR RECONSIDERATION, AND REPLY TO THE ANSWER IN OPPOSITION
(April 20, 2001)

On April 10, 2001, the Postal filed a Response to Order No. 1307, and a Motion for Reconsideration. On April 16, 2001, complainant Douglas Carlson filed an Answer in Opposition to the Postal Service's Motion for Reconsideration. In that pleading, Mr. Carlson took the position that the two amendments to his Complaint filed in response to Order No. 1307 should be considered as if they were "hypothetical" claims filed in accordance with provisions of the Federal Rules of Civil Procedure. Given that the question of the application of principles from the Federal Rules arose for the first time in the Answer in Opposition, the Postal Service submits that it is appropriate for the Postal Service to be granted leave to respond on that narrow issue. Therefore, the Postal Service respectfully requests that the reply provided below be accepted.

Reply

In his Answer in Opposition, Mr. Carlson states the view that the guidelines for evaluating the sufficiency of pleadings reflected in the Federal Rules of Civil Procedure should be employed by the Commission in reviewing his complaint. See, e.g., Answer

in Opposition at 3-4. More specifically, Mr. Carlson claims:

> Once again, the Federal Rules of Civil Procedure provide useful guidance on interpreting my amended complaint. The federal rules allow parties to plead hypothetical claims that they intend to prove through discovery or at trial. *See* Fed.R.Civ.P. 8(e). Under the federal rules, my amended complaint would be sufficient to raise the issue of the adequacy of current service levels as an issue for consideration.

Id. at 6. Mr. Carlson is mistaken. His amended complaint would not be sufficient to be accepted as a "hypothetical" claim under those rules.

Before addressing the collateral matter of the federal rule on hypothetical claims, however, it is necessary to restate the direct matter in contention. Section 3662 of title 39 explicitly identifies what is required to initiate a complaint -- the allegation of a belief by the complainant that he is not receiving postal services in accordance with the policies of the Act. Because Mr. Carlson's complaint, even as amended, does not pass muster under this provision, the Postal Service has renewed its motion to dismiss. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Blackburn v. City of Marshall*, 42 F3d 925, 931 (5th Cir 1995) (quoting 2A *Moore's Federal Practice* § 12.07 [2.-5] at 12-91). Under the federal rules, the desire of the complainant to engage in discovery does not alter this conclusion:

> The purpose of F.R.Civ.P. 12(b)(6) [authorizing motions requesting dismissal for failure to state a claim upon which relief can be granted] is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery. *Greene v. Emerson Ltd*, 86 FRD 66, 73 (SDNY 1980), *aff'd* 736 F2d 29 (2d Cir 1984). . . . As observed in *Havoco of America Ltd v. Shell Oil Co*, 626 F2d 549, 553 (7th Cir 1980), "if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." It is sounder practice to determine whether there is any reasonable

> likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.

Rutman Wine Co. v. E & J Gallo Winery, 829 F2d 729, 738 (9th Cir 1987).

Mr. Carlson attempts to evade the effect of these principles by asserting that his amended complaint constitutes a "hypothetical" claim, as would be authorized under the federal rules by Rule 8(e). In fact, however, an acceptable "hypothetical" claim is formulated as an "if-then" allegation. *General Acquisitions, Inc. v. GenCorp Inc.*, 766 FSupp 1460, 1476-77 (SD Ohio 1990). *If* certain identified facts believed to be true can be shown to be true, *then* a valid basis for relief would be established. Other cases equating hypothetical claims with "if-then" allegations include *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 14 FRD 401, 402 (DMinn 1953) and *In Re Sunrise Securities Litigation*, 793 FSupp 1306, 1312 (ED Pa 1992). Under circumstances in which the conditions which would confirm the predicate for relief are clear, this may be a "practical and straightforward manner in which to assert a claim." *See, GenCorp, supra*, 766 FSupp at 1477.

Even as amended, Mr. Carlson's complaint does not conform to the "if-then" structure of hypothetical pleading contemplated by Fed.R.Civ.P. 8(e). He has merely appended to his earlier document at two places the additional allegation that the current level of service "may not be adequate" within the meaning of section 3661(a). No attempt whatsoever has been made in the Complaint to specify what factual conditions, if shown to be true, would establish the conclusion that current service is not adequate. Instead of a hypothetical claim, Mr. Carlson has presented nothing more than a conclusory suggestion that he may, or may not, be entitled to relief.

In some respects, Mr. Carlson's posture is similar to that of the plaintiffs in *Sprague Farms Inc. v. Providian Corp.*, 929 FSupp 1125 (CD Ill 1996). In that case, the plaintiff landowners alleged, in essence, that if petroleum leaks from defendant's adjacent property had contaminated their farm, then plaintiffs were entitled to compensation for defendants' unlawful conduct. *Id.* at 1129. Of course, in contrast to the complaint of Mr. Carlson, these allegations at least did fit the "if-then" structure of a hypothetical claim under Rule 8(e). Plaintiffs apparently intended to investigate the presence of petroleum contamination, the factual component of the hypothetical, subsequent to the filing of their complaint. The court pondered the issue of whether Fed.R.Civ.P. 11(b)(3) authorized such a strategy in its provisions allowing "allegations and other factual contentions ... if specifically so identified, [as] likely to have evidentiary support after a reasonable opportunity for further investigations or discovery."

The court framed its inquiry as follows:

> Do Rule 8(e) and Rule 11(b)(3) always allow a party to hypothetically plead the essential elements of a claim or do those rules serve a more limited purpose? This inquiry leads to another, more fundamental question: can a party ever hypothetically plead the entry or invasion of land that forms the basis of a claim of trespass or nuisance?
>
> Common sense suggests that the answers to the questions should be "of course not." *The average citizen would not believe that someone can file a lawsuit in federal court without first determining whether or not he or she has been harmed by someone else.*

Id. at 1130 (emphasis added). The court cited an earlier case, *Geisinger Medical Center v. Gough*, 160 FRD 467 (MDPa 1994), which also rejected the suggestion that parties have "a general license to plead a claim first and then ... conduct the necessary

investigation in support of it." [1]

The court found that Rules 8(e) and 11(b)(3) notwithstanding, litigants retain a "general obligation to review the facts and information within their reach before making allegations." *Id.* at 1131. The court then held that plaintiffs in that case had failed to comply with this obligation:

> In this case, Sprague Farms still owns the potentially polluted portion of Parcel 3. Therefore, Sprague Farms could have tested for contamination before filing this lawsuit. Apparently, Sprague Farms did not do so. . . . Under these circumstances, Sprague Farms' hypothetical allegation [if Parcel 3 was contaminated, defendants were liable] is not enough. Sprague Farms offers no reason why it could not first determine whether Parcel 3 was polluted. Third parties and opponents did not control this information -- Sprague Farms did. Sprague Farms does not claim that it was under time pressure to file its claims against [defendants]. Therefore, Rule 11(b)(3) does not apply. Sprague Farms has not sufficiently alleged the existence of pollution to support a claim of trespass or nuisance against [defendants].

Id.

Mr. Carlson has similarly failed to allege sufficiently an appropriate claim under section 3662. By the very terms of that provision, it is the postal services which Mr. Carlson himself is receiving that must be alleged to fail to comply with the policies of the Act. Just as the court in *Sprague Farms* found incredible the proposition that a landowner could present a hypothetical claim without determining the condition of his own property, it stretches the bounds of credulity to expect that Mr. Carlson should be

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[1] While the court in *Geisinger* rejected plead-first-and-investigate-later as a general model, the court in that case did allow such pleading in the presence of exigent circumstances (e.g., need to file a compulsory counterclaim), in which the party wishing to so plead faced some time pressure that required the submission of the claim but precluded adequate investigation. The court in *Sprague Farms* accepted this reasoning as well.

allowed to present a section 3662 complaint without reaching a determination regarding the condition of his own service. No one but Mr. Carlson possess information which can shed any light on whether or not he believes that the service he receives conforms with the policies of the Act -- such information is exclusively within his control. Moreover, not only can Mr. Carlson commit to nothing more than the suggestion that holiday and holiday eve service "may" be inadequate, but in his Opposition, he is now conceding that he cannot even assure the Commission that he necessarily intends to submit evidence on the issue of adequacy of service. Answer in Opposition at 5. The facade of a "hypothetical" claim has crumbled even before he could complete its construction.[2]

Conclusion

As stated in the Postal Service's Motion for Reconsideration, an alleged failure to comply with the procedures of section 3661(b) provides no suitable basis to proceed with a section 3662 service complaint. The additional grounds ostensibly provided in the amended complaint, that holiday and holiday eve service "may not be adequate," likewise fail to meet the jurisdictional requirements of that section. As shown above, Mr. Carlson is mistaken in his assertion that this form of pleading constitutes a sufficient

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[2] The court in *Sprague Farms* also found an additional fault with the type of approach Mr. Carlson has pursued in his amended complaint. Characterizing the relevant portions of the complaint before it as the mere assertion "that a controversy *may* exist if Sprague Farms subsequently discovers pollution on Parcel 3" (emphasis added), the court questioned whether such an allegation met the Constitutional requirements of a "case or controversy." *Id.* at 1131-32. The court concluded that the facts as alleged in that case presented a hypothetical question to the court, but did not present an actual controversy. Surely a similar conclusion must apply to the mere claim that services "may" not comply with the policies of the Act.

"hypothetical" claim to be viable under Federal Rule 8(e). As quoted above, the court in *Sprague Farms* identified litigants' "general obligation to review the facts and information within their reach before making allegations." Not only has the complainant been remiss in this regard with respect to his amended complaint, but he also has not sufficiently explained the relationship between the facts which are available, and the specific policies of the Act with which he "may" believe that the Postal Service has failed to comply. Under these circumstances, it would be inappropriate to allow him to initiate discovery, particularly when he simultaneously admits that he may not even bother to submit any evidence on these matters. As the court did in *Sprague Farms*, the Commission should dismiss the complaint, albeit without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

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